

IP 05-0241-M 1 F USA v Gutierrez

Magistrate Kennard P. Foster

Signed on 6/30/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

V.

JULIO CESAR GUTIERREZ,

Defendant.

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CAUSE NO. IP 05-0241M-01

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	
)	
JULIO CESAR GUTIERREZ,)	CAUSE NO. IP 05-0241M-01
)	
Defendant.)	

ENTRY AND ORDER OF DETENTION PENDING TRIAL

SUMMARY

The defendant is charged in a criminal complaint issued on June 17, 2005, with conspiracy to possess with intent to distribute and/or distribute 500 grams of a mixture or substance containing a detectable amount of methamphetamine, a Schedule II Non-Narcotic Controlled Substance, in violation of Title 21 U.S.C. §§841(a)(1), 841(b)(1)(A)(viii) and 846. On June 17, 2005, at the initial appearance, the government filed a written motion for detention pursuant to 18 U.S.C. §§3142(e), (f)(1)(B), (f)(1)(C), and (f)(2)(A) on the grounds that the defendant is charged with an offense for which the maximum sentence is life imprisonment, a drug trafficking offense where the maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act and the defendant is a serious risk of flight, if released. The detention hearing was held on June 23, 2005. The United States appeared by Barry D. Glickman, Assistant United States Attorney. Julio Cesar Gutierrez

appeared in person and by his appointed counsel, James C. McKinley, Assistant Federal Community Defender.

With respect to the preliminary issue, the defendant waived his right to a hearing and submitted on the issue of probable cause. Consequently, the Court found that the evidence constituted probable cause to believe that the defendant committed the crime of conspiracy to possess with intent to distribute and/or distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, as charged in the complaint. The probable cause finding gave rise to the presumptions that there is no condition or combination of conditions which will reasonably assure the appearance of the defendant or the safety of the community.

At the detention hearing, the government rested on the complaint. Counsel for the defendant presented no witnesses and proceeded by proffer. The defendant did not rebut either the presumption that he is a danger to the community or the presumption that he is a risk of flight and, consequently, was ordered detained.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The defendant is charged in a criminal complaint issued on June 17, 2005, with conspiracy to possess with intent to distribute and/or distribute 500 grams of a mixture or substance containing a detectable amount of methamphetamine, a Schedule II Non-Narcotic Controlled Substance, in violation of Title 21 U.S.C. §§841(a)(1), 841(b)(1)(A)(viii) and 846.

2. The penalty for conspiracy to possess with intent to distribute and/or distribute 500 grams of a mixture or substance containing a detectable amount of methamphetamine, a

Schedule II Non-Narcotic Controlled Substance, in violation of Title 21 U.S.C. §§841(a)(1), 841(b)(1)(A)(viii) and 846 is a mandatory minimum sentence of 10 years and a maximum of life imprisonment. 21 U.S.C. § 841(b)(1)(A)(viii).

3. The Court takes judicial notice of the criminal complaint in this cause. The Court further incorporates the evidence admitted during the detention hearing, as if set forth here.

4. With respect to the preliminary issue, the defendant waived his right to a hearing and submitted on the issue of probable cause.

5. The Court finds there is probable cause for the offense the defendant is charged with in the complaint, and the rebuttable presumptions arise that the defendant is a serious risk of flight and a danger to the community. 18 U.S.C. § 3142(e).

6. The Court admitted a Pre-Trial Services Report (PS3) regarding Mr. Gutierrez on the issue of his release or detention. Mr. Gutierrez is age 28 (DOB 8/26/76). The PS3 indicates that the defendant has no ties to the Southern District of Indiana. The PS3 also contains the following criminal history:

(A) On November 4, 2001, in Los Angeles Superior Court, he was convicted of Infliction of Corporal Injury To A Spouse. He was sentenced to 6 days jail and was placed on probation for three years.

(B) On January 7, 2003, he was convicted in West Covina, California, of Driving With A Suspended License. He was placed on probation for three years and was sentenced to perform 25 days community service. The defendant failed to complete the community service and failed to pay the applicable fine. His probation was revoked on March 22, 2004, and a bench warrant was issued. The bench warrant was still active at the time he committed the offense charged in the criminal complaint in this case.

7. The defendant has failed to rebut the presumption that he is a serious risk of flight, and a danger to the community and any other person. Therefore, Julio Cesar Gutierrez is ORDERED DETAINED.

8. When a motion for pretrial detention is made, the Court engages a two-step analysis: first, the judicial officer determines whether one of six conditions exists for considering a defendant for pretrial detention; second, after a hearing, the Court determines whether the standard for pretrial detention is met. *United States v. Friedman*, 837 F.2d 48, 49 (2nd Cir. 1988).

A defendant may be considered for pretrial detention in only six circumstances: when a case involves one of either four types of offenses or two types of risks. A defendant is eligible for detention upon motion by the United States in cases involving (1) a crime of violence, (2) an offense with a maximum punishment of life imprisonment or death, (3) specified drug offenses carrying a maximum term of imprisonment of ten years or more, or (4) any felony where the defendant has two or more federal convictions for the above offenses or state convictions for identical offenses, 18 U.S.C. § 3142(f)(1), or, upon motion by the United States or the Court *sua sponte*, in cases involving (5) a serious risk that the person will flee, or (6) a serious risk that the defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, a prospective witness or juror. *Id.*, §3142(f)(2); *United States v. Sloan*, 820 F.Supp. 1133, 1135-36 (S.D. Ind. 1993). The existence of any of these six conditions triggers the detention hearing which is a prerequisite for an order of pretrial detention. 18 U.S.C. §3142(e). The judicial officer determines the existence of these conditions by a preponderance of the evidence. *Friedman*, 837 F.2d at 49. See *United States v. DeBeir*, 16 F.Supp.2d 592, 595 (D. Md. 1998) (serious risk of flight); *United States v. Carter*, 996 F.Supp. 260, 265 (W.D.

N.Y. 1998) (same). In this case, the United States moves for detention pursuant to §3142(f)(1)(B), (C), and (f)(2)(A) and the Court has found these bases exist.

Once it is determined that a defendant qualifies under any of the six conditions of §3142(f), the court may order a defendant detained before trial if the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community. 18 U.S.C. §3142(e). Detention may be based on a showing of either dangerousness or risk of flight; proof of both is not required. *United States v. Fortna*, 769 F.2d 243, 249 (5th Cir. 1985). With respect to reasonably assuring the appearance of the defendant, the United States bears the burden of proof by a preponderance of the evidence. *United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985); *United States v. Himler*, 797 F.2d 156, 161 (3rd Cir. 1986); *United States v. Vortis*, 785 F.2d 327, 328-29 (D.C. Cir.), *cert. denied*, 479 U.S. 841, 107 S.Ct. 148, 93 L.Ed.2d 89 (1986); *Fortna*, 769 F.2d at 250; *United States v. Chimurenga*, 760 F.2d 400, 405-06 (2nd Cir. 1985); *United States v. Orta*, 760 F.2d 887, 891 & n. 20 (8th Cir. 1985); *United States v. Leibowitz*, 652 F.Supp. 591, 596 (N.D. Ind. 1987). With respect to reasonably assuring the safety of any other person and the community, the United States bears the burden of proving its allegations by clear and convincing evidence. 18 U.S.C. § 3142(f); *United States v. Salerno*, 481 U.S. 739, 742, 107 S.Ct. 2095, 2099, 95 L.Ed.2d 697 (1987); *Portes*, 786 F.2d at 764; *Orta*, 760 F.2d at 891 & n. 18; *Leibowitz*, 652 F.Supp. at 596; *United States v. Knight*, 636 F.Supp. 1462, 1465 (S.D. Fla. 1986). Clear and convincing evidence is something more than a preponderance of the evidence but less than proof beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418, 431-33, 99 S.Ct. 1804, 1812-13, 60 L.Ed.2d 323 (1979). The standard for pretrial detention is “reasonable assurance”; a court may not order pretrial detention because there is no condition

or combination of conditions which would *guarantee* the defendant's appearance or the safety of the community. *Portes*, 786 F.2d at 764 n. 7; *Fortna*, 769 F.2d at 250; *Orta*, 760 F.2d at 891-92.

9. A rebuttable presumption that no condition or combination of conditions will reasonably assure the defendants' appearance or the safety of any other person and the community arises when the judicial officer finds that there is probable cause to believe that the defendant committed an offense under (1) the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*; the Controlled Substances Import and Export Act, 21 U.S.C. § 951 *et seq.*, or the Maritime Drug Law Enforcement Act, 46 U.S.C. App. § 1901 *et seq.*, for which a maximum term of imprisonment of ten years is prescribed; (2) 18 U.S.C. § 924(c); (3) 18 U.S.C. § 956(a); or (4) 18 U.S.C. § 2332b. 18 U.S.C. § 3142(e).

This presumption creates a burden of production upon a defendant, not a burden of persuasion: the defendant must produce a basis for believing that he will appear as required and will not pose a danger to the community. Although most rebuttable presumptions disappear when any evidence is presented in opposition, a § 3142(e) presumption is not such a "bursting bubble". *Portes*, 786 F.2d at 765; *United States v. Jessup*, 757 F.2d 378, 383 (1st Cir. 1985). Therefore, when a defendant has rebutted a presumption by producing some evidence contrary to it, a judge should still give weight to Congress' finding and direction that repeat offenders involved in crimes of violence or drug trafficking, as a general rule, pose special risks of flight and dangers to the community. *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986) (presumption of dangerousness); *United States v. Diaz*, 777 F.2d 1236, 1238 (7th Cir. 1985); *Jessup*, 757 F.2d at 383.

The Court has found the presumptions arise in this case and have not been rebutted.

10. If the defendant had rebutted the presumptions, the Court would consider the evidence presented on the issue of release or detention weighed in accordance with the factors set forth in 18 U.S.C. § 3142(g) and the legal standards set forth above. Among the factors considered both on the issue of flight and dangerousness to the community are the defendants character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearances at court proceedings. 18 U.S.C. § 3142(g)(3)(A). The presence of community ties and related ties have been found to have no correlation with the issue of safety of the community. *United States v. Delker*, 757 F.2d 1390, 1396 (3rd Cir. 1985); S.Rep. No. 98-225, 98th Cong., 1st Sess. at 24, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3207-08.

11. In this regard, the Court finds and concludes that the evidence in this case demonstrates the following:

a. On June 14, 2005, at approximately 8:20 p.m., Sergeant K. Kyte of the Oklahoma City Police Department, conducted a vehicle stop on North Bound I-35 in the vicinity of NE 122nd St for a traffic violation. Sgt. Kyte stopped a 2002 Ford Windstar minivan, grey in color, bearing California registration 5LIE063, for failing to signal a distance of 100 feet prior to making a lane change on three occasions.

b. Sgt. Kyte approached the rear of the vehicle and motioned for the driver to meet him at the rear bumper of the vehicle. The driver met Sgt Kyte at the rear of the vehicle and was identified as Julio Cesar GUTIERREZ. Also present in the vehicle was GUTIERREZ' wife, Maribel Esmeralda ANDRADE, and his two year old son. When Sgt Kyte asked GUTIERREZ about the purpose of his trip GUTIERREZ stated he was traveling to St. Louis,

Missouri to pick up his mother who was staying with his sick grandmother. While providing this explanation, GUTIERREZ appeared to be deceptive in nature and looked as if he had to think about his answers to the officers' questions. Sgt. Kyte requested GUTIERREZ have a seat in the back seat of his patrol car. Sgt Kyte then approached the passenger side of the vehicle to obtain the insurance and registration information. Sgt. Kyte contacted ANDRADE who opened the passenger door, at this time Sgt Kyte noticed the overwhelming odor of air freshener emitting from the vehicle. While Sgt Kyte was obtaining the vehicle registration Sgt Kyte engaged Maribel Esmeralda ANDRADE in conversation regarding the nature of their trip. ANDRADE made contradictory statements as to the purpose of the trip as compared to what GUTIERREZ provided. Sgt Kyte then obtained verbal consent to search the vehicle from GUTIERREZ. While Sgt Kyte was conducting the business of the traffic stop, Sgt Kyte requested a certified narcotics K-9 handler to the scene. Sgt Kyte called Sgt. M. James and his K9 Sophie to the scene. Sophie indicated a positive alert to the odor of controlled substances. A search of the vehicle revealed two concealed compartment within the frame rails of the van. The compartments were opened and 17 bundles of a substance, which field-tested positive for the presence of methamphetamine, were found wrapped in green cellophane. c.

GUTIERREZ was placed under arrest and subsequently advised of his *Miranda* rights by Detective T. Aragon. GUTIERREZ told Det. Aragon that he understood his rights and that he was transporting narcotics in the hidden compartment of the vehicle. GUTIERREZ identified a subject known to GUTIERREZ as Gregorio ESQUIVEL as the person who furnished GUTIERREZ with the vehicle in Pomona, California on June 14, 2005. GUTIERREZ advised law enforcement that he was to drive to Indianapolis, and call "Lalo" Last Name Unknown (LNU). Law enforcement has subsequently identified "Lalo" as Eduardo CRUZ. CRUZ

would then advise GUTIERREZ where to meet him and exchange his van with the narcotics for another vehicle. GUTIERREZ would then wait until CRUZ returned the van, having replaced the narcotics with money, and return the van with currency to California.

d. GUTIERREZ agreed to attempt a controlled delivery of the suspected methamphetamine to CRUZ in Indianapolis. GUTIERREZ was accompanied by law enforcement agents to Indianapolis, Indiana .

e. Upon arriving in Indianapolis on June 15, 2005 GUTIERREZ placed a recorded and monitored telephone call to CRUZ. GUTIERREZ advised CRUZ that he was approaching Indianapolis. CRUZ told GUTIERREZ to meet him at a gas station off the I-70 Keystone St exit. While GUTIERREZ was being transported, a series of phone calls ensued between CRUZ and GUTIERREZ attempting to coordinate the meet location between CRUZ and GUTIERREZ. GUTIERREZ arrived a Holiday Inn Express off the I-65 and Keystone Ave exit at approximately 4:55 PM. June 15, 2005. GUTIERREZ advised CRUZ over the phone of his location and CRUZ said he knew where that was and would be there shortly. At approximately 5:05 P.M., a red Chevrolet Impala bearing Indiana registration 97L6165, drove on to the parking lot of Holiday Inn Express. Agents observed CRUZ meet with GUTIERREZ and take possession of the van. CRUZ gave GUTIERREZ the keys to the red Impala. CRUZ told GUTIERREZ he would need his help to get into the vehicle compartment later that evening. GUTIERREZ advised CRUZ that it was easy to do and that he would explain it to him over the phone. CRUZ said he would return the van no later than the next morning.

f. On June 16, 2005 at approximately 11:16 a.m., GUTIERREZ spoke with CRUZ on the phone and agreed to explain how to open the compartment to CRUZ while he performed the task. At approximately 11:56 a.m., surveillance units observed CRUZ leave a

residence located at 1156 Dawson, Indianapolis, IN, and enter a detached garage where the van was parked. GUTIERREZ was on the phone with CRUZ and explained how to open the compartment. Law enforcement officers approached the garage at 1156 Dawson and encountered CRUZ standing at the front passenger door of the van with the compartment open. At this time, CRUZ was placed into custody. Law enforcement officers also encountered CRUZ' wife Leydia Gonzales seated in the second row seats of the van at this time.

g. After taking CRUZ into custody, CRUZ stated to law enforcement that 1156 Dawson was his residence. Officers then obtained consent to search 1156 Dawson from CRUZ. A search of 1156 Dawson revealed approximately 2,396 grams of a substance which field tested positive for the presence of cocaine, approximately 695 grams of a substance which field-tested positive for the presence of methamphetamine, a large quantity of United States Currency, digital scales, two handguns, packaging materials, and cutting agents.

h. The evidence demonstrates a strong probability of conviction.

i. The mandatory minimum sentence of 10 years and the maximum potential sentence of life imprisonment, when coupled with the fact that Gutierrez has no ties to the Southern District of Indiana, has an outstanding active bench warrant from the state of California, and failed to follow the orders of the West Covina, California court, substantially increases the seriousness of his risk for flight.

The Court having weighed the evidence regarding the factors found in 18 U.S.C. §3142(g), and based upon the totality of evidence set forth above, concludes that if the defendant had rebutted the presumptions in favor of detention, he nevertheless, would be detained, because he is a serious risk of flight and clearly and convincingly a danger to the community.

WHEREFORE, JULIO CESAR GUTIERREZ is hereby committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. He shall be afforded a reasonable opportunity for private consultation with defense counsel. Upon order of this Court or on request of an attorney for the government, the person in charge of the corrections facility shall deliver the defendant to the United States Marshal for the purpose of an appearance in connection with the Court proceeding.

Dated this ____ day of June, 2005.

Kennard P. Foster, Magistrate Judge
United States District Court

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